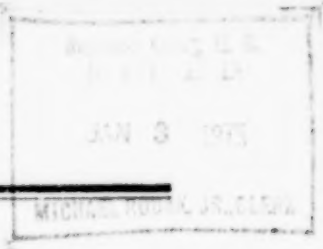
No. 73-1977



IN THE

Supreme Court of the United States

OCTOBER TERM 1974

ALYESKA PIPELINE SERVICE COMPANY,
Petitioner,

v.

THE WILDERNESS SOCIETY, ENVIRONMENTAL DEFENSE FUND, INC., and FRIENDS OF THE EARTH,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF CENTER FOR LAW IN THE PUBLIC INTEREST, CITIZENS COMMUNICATIONS CENTER, INSTITUTE FOR PUBLIC INTEREST REPRESENTATION, LEGAL ACTION CENTER OF THE CITY OF NEW YORK, INC., PUBLIC ADVOCATES, INC., AND SIERRA CLUB LEGAL DEFENSE FUND, AMICI CURIAE

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INTEREST OF AMICI

Amici Curiae are public interest law firms which, over the past five years, have begun operation in an effort to provide representation to previously unrepresented groups.

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*Consent has been given by petitioner and respondents to the filing of this brief amici curiae. Copies of such consent have been filed with the Clerk of this Court.

Amici have participated in proceedings in state and federal courts and in a wide range of administrative agencies — from the Federal Trade Commission to the Comptroller of the Currency, from the United States Parole Board to the Federal Communications Commission. Through representation by the amici, many individuals and citizen groups who had never previously had an opportunity to participate in important decisions directly affecting their vital interests had access to the process by which these decisions are made.

Amicus Center for Law in the Public Interest, located in Los Angeles, began operations in 1971. It now has a staff of six attorneys and a budget of $300,000 per year. It is primarily engaged in providing representation in the areas of employment discrimination and environmental protection. In *Davis v. County of Los Angeles*, Civ. No. 73-63-WPG (C.D. Cal., June 7, 1973), the Center received a court-awarded fee of $60,000, a sum which now helps to pay the cost of its public interest program. Other cases in which fee awards to the Center were made are now pending on appeal.

Amicus Citizens Communications Center, Inc., is a Washington-based public interest law firm, incorporated since 1971. *Citizens* is dedicated to enabling minorities, women, and listeners to participate in proceedings before the Federal Communications Commission and to assuring that the Commission meets its statutory obligation to serve the public interest in the allocation and renewal of broadcast licenses, cable television facilities, and other forms of telecommunications. Its annual budget is $250,000. *Citizens* has a long-standing interest in the attorneys' fee issue. See *Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519 (D.C. Cir. 1972) (citizen groups may accept reimbursement of costs, including attorneys' fees, in a settlement of a challenge to a license renewal);

Turner v. FCC, Case No. 74-1298 (D.C. Cir., filed February 28, 1974) (pending case involving propriety of agency-ordered attorneys' fees).

Amicus Institute for Public Interest Representation, founded in 1971, is a part of the Georgetown Law School. Its annual budget of $130,000 per year is met by a Ford Foundation grant.

Amicus Legal Action Center of the City of New York, Inc., founded in 1973, is a public interest law firm focusing on the criminal justice system, with emphasis on problems of rehabilitation. It has been active in challenging various forms of discrimination suffered by persons with histories of arrests, convictions, and drug use, particularly in employment. The Center employs six attorneys, with a budget of approximately $300,000. The Legal Action Center's ability to continue its work on a long-term basis depends on its capacity to obtain court-awarded attorneys' fees and costs in appropriate cases. Both foundation and government sources which have provided support to the Legal Action Center have insisted that the Center demonstrate its ability to develop alternative sources of funding.

Amicus Public Advocates, Inc., is a San Francisco-based firm which has a staff of seven attorneys and seven law student interns. Founded in 1971, its annual budget is approximately $400,000 per year. It represents more than 70 minority and women's organizations plus a number of senior citizens, community, and environmental groups. Public Advocates has a vital interest in the attorneys' fee issue, notwithstanding the fact that most of the firm's time is spent on matters which could in no event generate a fee. A United States Magistrate has recommended a fee of $200,000 in *W.A.C.O. v. Alioto*, Civ. No. C-70-1335 WTS (N.D. Cal.). Among the cases in which Public Advocates' attorneys have participated is *Serrano v. Priest*, 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971), in which costs

alone — not including attorneys' fees — were over $35,000[1]. According to present projections, Public Advocates will have to terminate its activities in late 1977, unless substantial attorneys' fees are received in a wide range of cases.

Amicus Sierra Club Legal Defense Fund is a public interest law firm with offices in San Francisco and Denver. It conducts an overall program of environmental protection, with strong emphasis on public land use policy. It has a full-time staff of seven attorneys and also retains a number of cooperating attorneys to handle particular cases. The Fund's operating budget is approximately $500,000. The Fund has a particular interest in recovery of attorneys' fees, because it now holds in escrow a $20,000 court-awarded attorneys' fee, awaiting an Internal Revenue Service ruling. The attorneys' fee award was made by the district court in *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (affirmance by an equally divided court). The question of an award of attorneys' fees to the Fund is pending in a number of other matters.

ARGUMENT

I

INTRODUCTION: CHARACTERISTICS OF PUBLIC INTEREST LAW FIRMS

Amici have in common a number of characteristics. These are shared by the Center for Law and Social Policy, which has provided lead counsel to respondents in the instant case. These characteristics include:

1. Amici have been established to provide legal services to groups and individuals who previously lacked access to

[1] Statement of J. Anthony Kline, *Hearings on Legal Fees before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93rd Cong., 1st. Sess., p. 797 (1973).

courts and administrative agencies. Amici are "public interest law firms" in the sense that by providing such representation, they invigorate the adversary process, increase the range of inputs to decision-makers, and increase the likelihood of decisions that reflect all competing interests. The term does not imply that these firms have any special knowledge of where the public interest lies or that the substantive positions held by their clients necessarily coincide with "the public interest". Their commitment is to an adversary process from which the public interest is most likely to emerge.

2. Amici are established as tax exempt organizations under Section 501(c)(3) of the Internal Revenue Code[2], under the direction of boards of trustees, which include leading members of the Bar. All conform to the IRS requirements for public interest law firms.[3] In a ruling received by amicus Public Advocates, Inc., the Internal Revenue Service has ruled that tax-exempt public interest law firms may accept attorneys' fees awarded by a court or administrative agency against opposing parties (or approved as part of a settlement). Int. Rev. Serv. Private Ruling, dated October 4, 1974. Such fees must be limited to fifty percent of the operating budget of the public interest firm. In a ruling received by amicus Citizens Communications Center, Inc., the Internal Revenue Service has ruled that tax exempt public interest law firms may not accept fees directly from clients. Int. Rev. Serv. Private Ruling, dated October 4, 1974.

[2] The Institute for Public Interest Representation is the only exception. However, while it is not a separate corporate entity but a constituent element of the Georgetown University, its operations, including the supervision of the board of trustees, are basically similar to that of firms which are tax exempt.

[3] Under the guidelines issued by the Internal Revenue Service, each public interest law firm must have a representative board of trustees, must represent broad public interests, and must report annually to the IRS on its activities. Rev. Proc. 71-39, 1971-2 C.B. 575.

3. Amici law groups are staffed by attorneys who are paid a fixed salary substantially below the rate at which they would be compensated in private practice. Salaries for experienced lawyers are generally in the $20,000 to $25,000 range. The highest salary paid to any attorney employed by amici is $32,500, and such salaries are limited to the most senior attorneys, with more than ten, and sometimes as much as thirty years' experience. Many attorneys who have come to amici groups from private firms have accepted substantial reductions in their compensation. Amici have been able to attract legal staffs of the highest professional competence, but their ability to continue to do so will depend on establishing reliable methods of obtaining funds in the future.

4. Amici rely heavily on a few foundations for their support. Amici have been generally informed by the foundations that, as in the case of many foundation projects, their support here is "seed money" and will not continue indefinitely.

> ". . . It is no secret, however, that NRDC [Natural Resources Defense Council] and other public interest firms cannot count on Ford Foundation support for any considerable time into the future. The foundation prefers to support fledgling organizations over an initial period, after which time they are expected to find the wherewithal to continue from other sources. The ability to stand on one's own feet, then, is the ultimate test of the experiment."
> Adams, "Responsible Militancy - The Anatomy of a Public Interest Law Firm," 29 The Record of the Ass'n of Bar of City of New York 631, 644 (1974).[4]

[4]See also Berlin, Roisman & Kessler," Public Interest Law", 38 G.W.L. Rev. 675, 686-87 (1970); Comment, "The New Public Interest Lawyers", 79 Yale L.J. 1069, 1148 (1970).

In addition, cutbacks in foundation support are likely in the near future because of current economic conditions.[5] Amici are each under an obligation to seek alternative sources of funding. Hence, amici have an institutional interest in the attorneys' fee awards to successful public interest litigants who bring suit to vindicate broad public interests. In addition, amici believe that the award of attorneys' fees in such cases will permit many more lawyers who are not associated with tax-exempt entities to become involved in such litigation.

5. Amici have represented citizen groups in a number of cases which have helped to clarify the meaning of ambiguous legislation, to assure that administrative decision-making followed statutory standards, and to enforce constitutional rights.[6] Amici have also participated in rule-making proceedings, informal discussions with government officials, and negotiations with private parties on behalf of various client groups. Litigation has been only one of the alternative methods of advocacy which amici have utilized.[7]

The interest of amici groups in this case does not spring exclusively from interests of institutional survival, although development of new funding sources, including attorneys' fee awards, is essential to their continuing viability. More important are the interests of the clients whom they have represented, and the public interest in having issues of public policy resolved on the basis of a full presentation of contrasting viewpoints and a robust adversary process. To meet these demands, existing public interest law programs will not be sufficient. A larger segment of the Bar will have to become involved in an expanded adversary process.

[5]"Ford Foundation to Slash Grants Over Next Four Years", N.Y. Times, December 15, 1974, p. 1.

[6]See discussion of some leading cases, *infra*, pp. 21-22.

[7]See Halpern, "Public Interest Law — Its Past and Future", 58 Judicature 118, 122-23 (1974).

The instant case illustrates one of the roles that public interest law firms have played during the past five years. Groups like the Wilderness Society and the other respondents lacked the resources to retain counsel to challenge the Trans-Alaska Pipeline, and the case was too big — and too fraught with possible conflicts of interest — for any private law firm to take it on a *pro bono* basis. Yet the Wilderness Society and its members had a vital interest in the disposition to be made by the Secretary of Interior of the Alaskan wilderness, and an equal interest in assuring that federal land laws and the newly passed National Environmental Policy Act were complied with. It was only the availability of charitably-supported counsel in public interest law firms that made it possible for the Wilderness Society to marshal the evidence and present its arguments to the Secretary and the courts forcefully, concretely, and professionally. Amici submit that the public interest was well served by having the issues fully presented in this fashion and finally submitted to Congress — after exhaustive environmental analysis triggered by this litigation.

But the likelihood of such suits being filed and litigated in the future is dependent in large measure on the resolution of the attorneys' fees aspect of the suit. Attorneys employed by the Center for Law and Social Policy, who were lead counsel in the case, are dependent on foundation support — and such support is likely to diminish in the future and, most important, cannot be counted upon indefinitely. As noted above, some of amici are already utilizing court awarded attorneys' fees to finance their continuing operations. If citizen grievances of this type are to be assured full and continuing access to the courts in the future, alternative funding sources must be developed. Specifically, the legal process itself must be structured so that participation in decision-making is economically feasible for citizen groups like the respondents. Shifting the

costs of litigation through attorneys' fee awards is a traditional and appropriate method to do so.

Amici urge the Court to affirm the Court of Appeals' award of attorneys' fees to the respondents herein. In supporting the position of respondents, amici will attempt to place this case in the broader context of the development of public interest law and the importance of attorneys' fee awards in cases of this character to the continuing vitality of a public interest bar, to the adversary process, and ultimately to our entire system of justice.

II

DEFINITION OF THE PROBLEM: THE ADVERSARY SYSTEM AND UNREPRESENTED CITIZEN INTERESTS

The American legal system is premised on the assumption that an adversary process is critical to effective and reliable decision-making. The courtroom is in this sense a microcosm of our larger political framework which assumes that the public interest will be most likely to emerge from a vigorous contest between private entities or groups pursuing their interests or the public interest as they perceive it. In the courts and regulatory agencies, however, the effectiveness of the adversary process turns on the availability of legal representation. The institutions which collectively make up the justice system have recognized that increasing the availability and quality of legal representation afforded to various segments of society is essential to the effective administration of justice. It is this perception that led to the development of "public interest law":

> "In this century, the goal of representing the unrepresented originated with a concern over the plight of 'weak minorities' in a democracy — the poor, political dissidents or victims of racial discrimination. And the earliest organized manifestations of public

> interest law — the legal aid societies, the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund, Inc. — were a response to the classic problem of protecting relatively powerless minority interests from an overbearing majority through provision of legal counsel. Heineman, Book Review, "In Pursuit of the Public Interest", 84 Yale L.J. 182, 183 (1974).

The civil rights area is perhaps the most striking example of a field where availability of legal representation caused a significant shift in national policy. The history of that development is instructive, and the lesson has been written by Mr. Justice Marshall in his essay, "Group Action in the Pursuit of Justice," 44 N.Y.U.L. Rev. 661 (1969). He recounted that despite the efforts of committed members of the bar in the struggle for justice, "the need for lawyers and supporting personnel cannot be met by individual effort; the task is simply too great. The need can be met only in an organized way." *Id.* at 663. It was not until the NAACP "developed a conscious program of legal action designed to eliminate discrimination and inequality" that significant progress was shown. *Id.* at 667.

> "The financial and human resources that were funnelled into this program were in large part responsible for recent successes in striking down discriminatory laws and practices. Similar examples could be multiplied. But whichever group you examine, one thing becomes evident: the organized and committed efforts of groups of this sort has been of immeasurable importance in making our constitutional guarantees meaningful." *Id.* at 667-68.

The dimensions of the task of representing interests heretofore denied equality in the legal system by lack of

counsel has been recognized in many ways. One of these has been awards of legal fees by both courts[8] and Congress[9] to plaintiffs in civil rights cases. This policy has substantially increased the number of lawyers actively handling such cases.

As Mr. Justice Marshall remarked, beyond issues of racial injustice, we are faced with "problems peculiar to the economically and socially disadvantaged . . . . But now who is to speak for the poor, the disadvantaged, and these days, for the ordinary consumer?" *Id.* at 668. The importance of this question increases as the role of government in the life of every individual becomes pervasive. Today, federal agencies make many decisions which have vital importance in the lives of all Americans. They decide energy policy; safety requirements for atomic power plants; what chemicals may be added to our food; what advertising claims can be made. They allocate public resources for private use "in the public interest" through licensure of broadcast stations, allocation of airline, rail, and truck routes, and subsidy of marine transport. To a substantial extent, they control the availability of goods and services and the prices we must pay for them.

Analysis of the functioning of the administrative process has revealed that it was not only the "weak minorities" that were excluded from the decisional processes. Large segments of the society were effectively excluded because of their lack of resources, expertise, and legal representation. Furthermore, their interests were so diffuse that it was not

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[8] *E.g., Cornist v. Richland Parish School Board*, 495 F.2d 189 (5th Cir. 1974); *Knight v. Auciello*, 453 F.2d 852 (1st Cir. 1972); *Lee v. Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971).

[9] *E.g.*, 42 U.S.C. § 2000a-3(b) (public accommodations); 42 U.S.C. §2000e-5(k) (employment discrimination). See *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

economical to pursue them.[10] The Administrative Conference of the United States has concluded that the costs of participation "can render the opportunity to participate meaningless." Recommendation 28 of the Administrative Conference of the United States - Public Participation in Administrative Hearings (adopted December 7, 1971), Par. D. See Gellhorn, "Public Participation in Administrative Proceedings," 81 Yale L.J. 359, 388-89 (1972).

Bureaucratic inertia and insensitivity necessarily follow from a lack of citizen involvement in agency decision-making processes. And the problem is exacerbated when some interests are forcefully represented while others are unrepresented.

Regulatory agencies have for many years suffered from a lack of adversariness in their proceedings. Too often the administrators hear only the industries' side of arguments and, predictably, their decisions reflect an industry slant.[11] Dean Roger Crampton, formerly Chairman of the Administrative Conference of the United States, has stated the problem as follows:

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[10]". . . with the growth of government intervention in social and economic life, the need arose to protect the interests of a 'diffuse majority' from the untoward influence on government agencies of corporate and other highly organized groups. Such influence frustrated implementation of legislation aimed at promoting a general public good . . . [and] diffuse majority interests . . . lack the resources and organizational muscle to counter expressions of power . . . by . . . concentrated centers of private power . . . ." Heineman, Book Review, "In Pursuit of the Public Interest", 84 Yale L.J. 182, 183-84 (1974).

[11]See *Thill Securities Corp. v. New York Stock Exchange*, 433 F.2d 264, 273 (7th Cir. 1970). ("[T]he history of United States regulatory agencies in general seems . . . to demonstrate that shortly following the establishment of administrative procedures the regulatory agency usually becomes dominated by the industry which it was created to regulate."); Noll, *Reforming Regulation*, pp. 31, 43-44 (Brookings Institution, 1971); Landis, *Report on Regulatory Agencies to the President-Elect*, pp. 43-44, 53, 70-72 (1960).

> "The cardinal fact that underlies the demand for broadened public participation is that governmental agencies rarely respond to interests that are not represented in their proceedings. And they are exposed, with rare and somewhat insignificant exceptions, only to the view of those who have a sufficient economic stake in a proceeding or succession of proceedings to warrant the substantial expense of hiring lawyers and expert witnesses to make a case for them. Non-economic interests or those economic interests that are diffuse in character tend to be inadequately represented, although agency staffs often make valiant efforts in this direction." Crampton, "The Why, Where and How of Broadened Public Participation in the Administrative Process," 60 Georgetown L.J. 525, 529 (1972).

Crampton then cites Lee C. White, former chairman of the Federal Power Commission, who has translated the problem into concrete terms:

> "A successful lawyer in Keokuk is appointed by the President to serve on an independent regulatory agency or as an assistant secretary of an executive department that exercises regulatory functions. A round of parties and neighborly acclaim surround the new appointee's departure from Keokuk. After the goodbyes, he arrives in Washington and assumes his high role as a regulator, believing that he is really a pretty important guy. After all, he almost got elected to Congress from Iowa. But after a few weeks in Washington, he realizes that nobody has ever heard of him or cares much what he does —

except one group of very personable, reasonable, knowledgeable, delightful human beings who recognize his true worth. These friendly fellows — all lawyers and officials of the special interests that the agency deals with — provide him with information, views, and most important, love and affection. Except they bite hard when our regulator doesn't follow the light of their wisdom. The cumulative effect is to turn his head a bit." Remarks of Lee C. White, Brookings Institution Conf. on Administrative Regulation, April 8, 1971. Quoted in Crampton, *supra* at 530, n.3.

The problem was put in sharp focus in a landmark decision written by Chief Justice (then Judge) Burger with regard to the Federal Communications Commission. In that case, a black citizens' group in Jackson, Mississippi, sought to participate in FCC proceedings to protest the renewal of the license of an allegedly racist broadcaster. The Commission excluded the citizens' group from the proceeding. The Court of Appeals reversed the Commission's ruling and delineated the right of citizen groups to participation in the proceedings of government agencies notwithstanding the agency's general mandate to puruse the public interest. The court held:

> "The theory that the Federal Communications Commission can always effectively represent the listener interests . . . without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it." *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1003-04 (D.C. Cir. 1966).

The *Church of Christ* decision explicitly recognized the propriety and importance of responsible citizen groups' participating in FCC proceedings. Indeed, as a result of *Church of Christ*, it is now recognized by the FCC that the entire scheme of the Communications Act of 1934, as amended, is based on such public participation.[12] But how can there be effective public participation without adequate legal representation for the public — with only one side (the broadcasters) having skilled lawyers who have continuing expertise in communications law?[13]

Thus, in the years immediately following the *Church of Christ* decision, few citizen groups went through the door opened by the decision and participated in FCC proceedings. Moreover, the logic of the court's decision was equally applicable to other agencies whose decisions directly affected the quality of the environment, the cost of goods, and the availability of services. But few citizen groups took advantage of this new opportunity.

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[12] See, *e.g.*, *Renewal of Broadcast Licenses*, 38 *Fed. Reg.* 28762-68, 28771-73, 28778-80 (1973); Sections 309, 311(a) of the Communications Act, 47 U.S.C. §§ 309, 311(a). And in the third *Church of Christ* case, 465 F.2d 519, 527 (1972), the court, relying upon the two prior *Church of Christ* cases, stated: "In recent years, the concept that public participation in decisions which involve the public interest is not only valuable but indispensable has gained increasing support".

[13] See *Richard Turner*, 45 FCC2d 377, 386 (1974), (dissenting opinion of Commissioner Hooks) ". . . it is evident that a lack of legal and financial resources is the largest single obstacle to such participation [of the public in the license renewal process]"; see also dissenting opinion of Commissioner Cox, *KCMC, Inc.*, 25 FCC2d 603, 606-14 (1970).

The reasons why the *Church of Christ* invitation was not accepted are not difficult to understand. The FCC, like most regulatory agencies, is surrounded by a specialized bar which serves the regulated industry; the communications bar serves station owners and the broadcast industry. Their services are priced beyond the financial reach of listener groups, and most of the specialists have conflict of interest problems — they represent broadcast industry interests and could not undertake the representation of citizen groups even if financial barriers were surmountable.

In 1966, when the *Church of Christ* case was decided, the interests of the listening public were rarely presented in the Commission. Even today there are just a handful of FCC specialists (including attorneys employed by Amicus Citizens Communications Center) who make their services available to listener groups, minorities, and others excluded from access to the media.

III
DEVELOPMENT OF ADVOCACY FOR UNREPRESENTED INTERESTS

During the past ten years, the legal profession has become increasingly sensitive to the need to structure the justice system in a manner which will assure access to the courts and regulatory agencies for all elements in the society. The development of the legal services program funded by the Office of Economic Opportunity in the mid-60's, with the active support of the American Bar Association, is one example of this commitment.[14]

Chesterfield Smith, past president of the American Bar Association, expanding on this theme, stated:

[14] See Tucker, "Pro Bono Publico or Pro Bono Organized Bar", 60 A.B.A.J. 916, 917 (1974).

> "One of the singular contributions of the common law legal system to the settlement of those disputes that must inevitably arise in human society is the adversary system. All American lawyers, whether they are trial lawyers or not, have a special interest in maintaining its viability and integrity.
>
> Recently the legal profession has come to accept as its special obligation the furnishing of legal representation to all who need it . . . .
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> * * *
>
> "If this is so, it is vital to the continuing viability of the adversary system that remedial action be instituted in behalf of the unrepresented. There are both individuals and groups who for practical purposes are barred from the courts and from legal process generally because they lack sufficient commitment and resources to support litigation on the same scale as their adversaries. Environmental and consumer concerns are two immediate and obvious examples." *President's Page*, 60 A.B.A.J. 641 (1974).

More particularly, the responsibility of bench and bar encompasses the obligation to assure that no significant segment of the American population is excluded from the courts and administrative agencies because counsel is unavailable.

During the past five years, a group of new legal institutions, public interest law firms, have developed to fill the advocacy gap in the area where governmental regulation impinges on citizen interests. Leading members of the legal profession, such as Justice Arthur Goldberg, Francis Plimpton, Whitney North Seymour, Jr., William T.

Coleman, Abram Chayes, Clark Byse, Boris Bittker, Miles Kirkpatrick, and Anthony Amsterdam have been involved in guiding and directing new public interest law firms.

The largest single source of support for public interest law has been The Ford Foundation. Since 1970, The Ford Foundation has made grants of approximately ten million dollars to public interest firms.[15] Ford grants represent the substantial bulk, two-thirds to three-quarters, of foundation funding for public interest law.

The Ford Foundation, before embarking on its public interest law support program, established an advisory committee consisting of Whitney North Seymour, William T. Gossett, Bernard Segal, and Orison Marden. This committee helped the Foundation develop and shape its public interest law program and has provided continuing advice to the Foundation on new grants and grant renewals over the past four years.

The Foundation supported public interest law in order to promote the adversary process in cases of public importance, to provide access to the decision-making process for groups and individuals who had previously been excluded, and to improve the administration of justice. The programs were undertaken on an experimental basis, the Foundation support has gone to institutions of varying focuses and structures. Some have focused on particular subjects — like the Citizens Communications Center on the FCC, and the Natural Resources Defense Council on environmental issues. Some combined broader areas of representation with programs of clinical education of law students (Institute for Public Interest Representation, at Georgetown Law School, and the Center for Law

[15] Ford Foundation grants to assist legal projects aiding minority groups are not included in this figure. Substantial grants have been made to such groups as the NAACP Legal Defense Fund, the Mexican American Legal Defense Fund, and the Native American Rights Fund.

and Social Policy, which is affiliated with the Yale, Pennsylvania, Michigan, Stanford, and UCLA Law Schools). Others focused on local and state matters (Center for Law and the Public Interest). Some build memberships and filed suits in their own names (Natural Resources Defense Council, Environmental Defense Fund) while otheres were aligned with existing membership organizations (Sierra Club Legal Defense Fund).

An early debate on the role and legitimacy of public interest law came in the fall of 1970 when the Internal Revenue Service announced its intention to stop issuing tax exemptions to public interest law firms. Out of that discussion came a clearer recognition of the need for a vigorous adversary system and the importance of the new public interest law firms in making that system work.[16] In Congress, the IRS action was opposed by [then] Congressman Gerald Ford, Senators Sam Ervin, Edmund Muskie, Robert Packwood, and many others.[17] Russell Train, then Chairman of the Council on Environmental Quality, in urging that the IRS action be reversed, summarized the role that public interest litigation had played in the environmental field:

> "Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs.
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> * * *

[16] Edward H. Levi, "Forward", *The Public Interest Law Firm: New Voices for New Constituencies*, p. 8 (Ford Foundation, 1973).

[17] See *Hearings on Tax Exemption for Charitable Organizations Affecting Poverty Programs Before the Subcomm. on Employment, Manpower, and Poverty of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. (1970).

> "We have observed that litigation brought by private groups which must rely on contributions for their support have performed at least three key functions in aid of our environmental protection programs:
>
> > They have strengthened and accelerated the process of enforcement of antipollution laws;
> >
> > They have identified gaps in our regulatory procedures as for example as in our pesticide controls and spurred action to remedy these gaps; and
> >
> > They have brought before the courts the public's interest in enforcement of such new governmental procedures as the Section 102 environmental impact statement requirement."[18]

At the Senate Hearings held on the IRS action, the IRS reversed its position, and began again to issue favorable rulings to public interest law firms.[19]

The impact of the new public interest law programs was substantial. To give but a few examples, there were:

Wyatt v. Aderholt, Civ. No. 72-2634 (5th Cir., November 8, 1974, *affirming in part* 344 F. Supp. 373 and 344 F. Supp. 387 (M.D. Ala. 1972) (involuntarily confined mental patients have constitutional right to treatment).

Morales v. Turman, Civ. Action No. 1948 (E.D. Tex. Sept. 3, 1974) (constitutional right to treatment and education for confined juvenile delinquents) (appeal pending).

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[18] *Id.* at 461.

[19] See Statement of Randolph W. Thrower, Commissioner of Internal Revenue, *id.* at p. 54.

Ocasio v. Klassen, 73 Civ. 2496 (S.D.N.Y., consent order entered November 25, 1974) (consent order modifying postal regulations regarding employemnt of former drug addicts).

La Raza Unida v. Volpe, 337 F. Supp. 221 (N.D. Cal. 1971, aff'd 488 F.2d 559 (9th Cir. 1973), *cert. denied*, __U.S.__ (1974) (highway construction barred pending compliance with relocation and environmental law and regulations).

Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971) (invalidating FCC 1970 comparative hearing renewal policy).

Alabama Educational Television Commission, 33 FCC 2d 495 (1972); New York Times, September 19, 1974, p.1. (denial of Alabama non-commercial TV licenses for discriminatory program and hiring practices).

Pickus v. U.S. Board of Parole, Civ. No. 73-1987 (D.C. Cir., October 11, 1974) (Parole Board is agency subject to Administrative Procedure Act rule-making requirements).

The impact of the public interest activity was particularly clear in the environmental area. In addition to the instant case, see, *e.g.*:

Sierra Club v. Ruckelshaus, 344 F. Supp. 253 (D.D.C. 1972), *aff'd sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973) (affirmance by an equally divided court) (under Clean Air Act, EPA must protect against degradation of air).

Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (public may participate in proceeding concerning pesticide [DDT] use).

Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) (environmental impact statement on offshore oil leasing inadequate for failure to examine alternatives).

Scientists Institute for Public Information v. AEC, 481 F.2d 1979 (D.C. Cir. 1973) (fast breeded reactor development program requires environmental impact statement fully assessing effects of new technology).

In its second annual report, issued in 1971, the Council on Environmental Quality stated:

> "Perhaps the most striking recent legal development has been the step-up in citizen 'public interest' litigation to halt degradation of the evnironment . . . . It has speeded court definition of what is required of Federal agencies under environment protection statutes. The suits have forced greater sensitivity in both government and industry to environmental considerations. And they have educated law makers and the public to the need for new environmental legislation.
>
> * * *
>
> What is unique about current citizen and environmental litigation is that the considerable resources, nationwide attention and judicial receptivity accorded it have created, in effect, an 'environmental ombudsman' for the Nation. Rather than creating a new public officer to challenge official action on environmental issues publicly, citizen groups are now doing it themselves — and are being effective." *Environmental Quality — The Second Annual Report of the Council on Environmental Quality*, pp. 155-56, 175. (1971).

But this new wave of citizen participation in government through the legal system will fade without an adequate financial base for legal representation. A small number of attorneys have established firms in recent years to provide

representation on a reduced fee basis to groups that had been previously unrepresented.[20] At the same time, a few large firms established *pro bono* departments in order to expand their charitable professional activity and provide representation to groups and individuals who were unable to pay their fees. See Comment, "The New Public Interest Lawyers", 79 Yale L.J. 1069 (1970). However, the involvement of the private bar in such activities has not been as widespread as had been hoped. The financial problems of the smaller new firms have been formidable, and even the larger firms have not been enthusiastic about undertaking massive cases without compensation.

IV

THE PROBLEM OF CONTINUING FINANCIAL SUPPORT FOR REPRESENTATION OF UNREPRESENTED INTERESTS

The heavy reliance of the public interest law development on foundation funding has been a matter of concern within the public interest bar and within the larger bar for some time. The preference of foundations for establishing new programs of an innovative character and then moving on to newer programs is well-known.[21] And the current economic climate will necessitate cutbacks in all foundation programs. Moreover, as public interest litigation has moved through the courts, it has become clear that the need for representation greatly exceeds the limited funds made available by the foundations. Hence, increasing attention has been given to the problem of developing funding sources which will assure the future vigor and expansion of public interest representation.

Last spring, The Ford Foundation convened a conference which brought together leaders of the organized bar, the

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[20] See Berlin, Roisman & Kessler, "Public Interest Law", 38 G.W.L. Rev. 675 (1970).

[21] See *supra*, p. 6.

public interest bar, and the foundations. It was agreed that future financing was the most critical problem facing the public interest law movement, and a Council for the Advancement of Public Interest Law, to focus on this future financing problem, was established. Membership on that council includes William Gossett, Chesterfield Smith, William Ruckelshaus, Burke Marshall, Orville Schell, Whitney North Seymour, Jr., and Mitchell Rogovin. The Council will explore and develop alternative funding sources. Availability of attorneys' fees awarded by courts in the exercise of their equitable powers will be a substantial factor in the Council's success.

The Council is supported by grants from foundations and, more significantly, by a grant of $50,000 from the American Bar Association Fund For Public Education. The commitment of the organized bar to the continuity and development of public interest law, manifested by that grant and by the ABA's Special Committee on Public Interest Practice, is extremely significant. It evinces a recognition that the legal profession has an independent obligation to assure the viability of the adversary process, without relying on the charitable impulses of private foundations.

V

THE AWARD OF ATTORNEYS' FEES

Amici urge the Court to affirm the decision of the Court of Appeals. Amici submit that the judicial process has sufficient flexibility within its doctrinal framework to assure that its courts are open to all. The allocation of the cost of litigation, including attorneys' fees, has always been viewed by equity as one of the methods open to it to affect the flow and form of litigation.[22] Moreover, it is a method which is uniquely within the control of the judiciary. The courts can

[22] *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939); *Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882).

evaluate on a case-by-case basis the contribution made by particular litigants, and the reasonableness of the payment requested.[23] It has its own built-in safeguard against frivolous litigation, since the party contemplating a suit knows that fees will not be reimbursed if the case is not meritorious. The Court of Appeals' exercise of its equitable powers in this case to require petitioner to pay one-half the reasonable fee of respondents' attorneys is wholly appropriate.

This Court should affirm the fee award and make it clear that attorneys' fee awards will continue to be used in the federal courts to assure access to the courts. Congress has, in a number of settings, passed laws authorizing or requiring attorneys' fee awards to successful plaintiffs who bring suit to vindicate legislative policies. While amici support such legislation, they urge the Court to recognize that the court system has independent, coordinate authority to shift the burdens of litigation in the interest of assuring that the courts and administrative agencies are open to all litigants.

The "American rule", stating that attorneys' fees in ordinary circumstances must be borne by the litigant even though he is successful in his suit, is a judge-made rule, and numerous exceptions to the rule have been carved out over time in pursuit of equitable objectives.[24]

[23] For example, Congress, the courts, and the FCC have dealt effectively with the problems of abuse in the payment of expenses in the communications area. See Section 311(c) of the Communications Act of 1934, as amended, 47 U.S.C. §311(c), limiting reimbursement of expenses to a dismissing competing applicant to an ". . . amount determined by the Commission to have been legitimately and prudently expended. . ."; *Office of Communication of the United Church of Christ v. FCC*, 465 F.2d 519, 524-27 (D.C. Cir. 1972); *KCMC, Inc.*, 25 FCC 2d 603, 613 (1970) (dissenting opinion).

[24] *Hall v. Cole*, 412 U.S. 1 (1973); *F.D. Rich Co. v. United States*, 94 S. Ct. 2157 (1974); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

Petitioners have suggested that there is no need for attorneys' fee awards in order to have cases like the instant case reach the courts. Petitioners' brief notes that the attorneys representing Respondents were salaried employees of Respondents or of public interest law firms, and that such cases "will continue to be brought, whether or not fees are awarded."

Amici submit that Petitioner misunderstands the problem. First, the instant case was brought and vigorously pursued because foundation-supported counsel were available to provide representation, but foundation support for public interest attorneys will not continue indefinitely. Second, the number of foundation-funded lawyers in this country probably does not exceed one hundred — a tiny fraction of the number that is needed. Third, the legal process should have within its own doctrines and institutions methods of assuring an effective adversary process. The award of attorneys' fees in cases involving significant public interests is just such a doctrine. The courts should not rely on the largesse of charitable foundations to cure substantial failings in the legal process.

CONCLUSION

In this brief, amici have tried to place this case in the broader context of public interest law development and to suggest this case's importance for future development within this area. By sustaining the Court of Appeals' decision, this Court would permit continuation of the common law process by which the lower courts are identifying the equitable factors which make attorneys' fee awards appropriate.

Respectfully submitted,

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